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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD WARREN, Petitioner - Appellant, v. DORA B. SCHRIRO;** ARIZONA ATTORNEY GENERAL, Respondents - Appellees.	No. 05-15122 D.C. No. CV-02-00823-NVW MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted December 5, 2005
San Francisco, California

Before: B. FLETCHER, THOMPSON, and BEA, Circuit Judges.

Petitioner-Appellant Donald Warren appeals the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Dora B. Schriro is substituted for her predecessor, Terry L. Stewart, as Director of the Arizona Department of Corrections. Fed. R. App. P. 43(c)(2).

We review de novo the district court's decision to deny Warren's habeas petition. *See Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). Because the parties are familiar with the case's facts, we do not recount them except as necessary to our disposition.

Because Warren failed to file his petition in the district court within the one-year period allowed under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, the state urges us to dismiss Warren's petition as untimely. Warren counters that the state waived its statute of limitations defense and that, in any event, he is entitled to equitable tolling. Because AEDPA's statute of limitations is not jurisdictional, *see Green v. White*, 223 F.3d 1001, 1003–04 (9th Cir. 2000), we elect to deny Warren's petition on the merits rather than reach the waiver and equitable tolling issues.

Warren's first substantive claim is that the trial court violated due process by accepting his no contest plea and sentencing him without *sua sponte* conducting a competency hearing or making an express finding of competency.[1] The state post-conviction court rejected this claim, a decision we review to determine whether it

[1] Warren also challenges the state post-conviction court's retroactive finding of competency and its fact-finding process. These claims, however, are based upon an alleged violation of state law and are not cognizable in federal habeas proceedings. *See Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam).

was "contrary to, or involved an unreasonable application of, clearly established Federal law," or was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1) & (2).

The evidence before the state trial court was insufficient to create a good faith doubt as to Warren's competency. Although the court knew that Warren was taking antipsychotic medication and medication for anxiety that could theoretically have affected his thought processing, it heard testimony from Warren's treating psychiatrist that Warren had "been on these medications for a long, long time" without any apparent "negative effect on his ability to reason." The trial court also had before it the opinions of four medical experts who had examined Warren after defense counsel noticed a possible insanity offense, not one of whom questioned Warren's competency. Indeed, one of these four experts expressly stated that Warren was competent to stand trial or enter a plea agreement. Similarly, Warren's treating psychiatrist testified at the change-of-plea hearing that he had no reason to doubt Warren was "competent to enter into a plea agreement, to waive his constitutional rights and all that that entails and to knowingly, intelligently and voluntarily enter into a plea agreement." This psychiatrist also testified that he believed Warren understood the "nature of the charges against him" and the

judicial "process—the role of the attorney, the Judge, the prosecutor and the jury." Finally, although Warren on two occasions expressed momentary confusion in response to questions from the trial court, the record does not support the dissent's characterization that he was "befuddled." On both occasions, Warren successfully resolved his uncertainty by conferring with counsel—a fact that, far from compelling good faith doubt as to Warren's competency, manifested an ability effectively to communicate with counsel. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (explaining that competence implies a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"). Thus, the trial court did not violate due process by failing *sua sponte* to conduct a competency hearing or make an express competency finding. *See Pate v. Robinson*, 383 U.S. 375, 385 (1966).

Warren also raises two sets of ineffective assistance of counsel claims. He contends trial counsel was ineffective for failing to request a competency hearing and for advising him to plead no contest, instead of proceeding to trial with an insanity defense. He also claims post-conviction appellate counsel were ineffective during his first round of state post-conviction proceedings for failing to raise an ineffective assistance of trial counsel claim or to withdraw to enable new,

independent counsel to raise the alleged insufficiency of trial counsel.[2] These claims were raised and rejected in a second state post-conviction proceeding.

We conclude that the state post-conviction court's rejection of the claims of ineffective assistance of trial and post-conviction appellate counsel was neither "contrary to, [n]or involved an unreasonable application of, clearly established Federal law;" nor was the rejection "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254(d)(1) & (2).

With regard to trial counsel, after investigating and considering an insanity defense, he made a reasonable tactical decision to advise Warren to plead no contest to the charges specified in the plea agreement. As noted above, four medical experts examined Warren with regard to his possible insanity defense. Two of them did not render an opinion as to Warren's sanity, one way or the other, at the time of the criminal acts. One of the experts opined Warren was legally sane

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[2] Although there is no Sixth Amendment right to effective assistance of post-conviction counsel, *Moorman v. Schriro*, 426 F.3d 1044, 1058 (9th Cir. 2005), there is such a right with respect to counsel on the first appeal as of right, *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Under Arizona law, by pleading no contest Warren forfeited his right to direct appeal. Ariz. Rev. Stat. § 13-4033(B). Consequently, his first round of post-conviction proceedings was his first appeal as of right, and he may challenge the effectiveness of his post-conviction counsel. *See State v. Pruett*, 912 P.2d 1357, 1359–60 (Ariz. App. 1995).

at the time of those acts and was also competent to stand trial or enter a plea agreement at the time of the expert's examination. The fourth expert, without questioning Warren's present competency, opined Warren was legally insane at the time of the charged criminal acts. Based on this evidence, trial counsel determined it would be too great a risk to go to trial on an insanity defense, recommending instead that Warren enter the settlement agreement and plead no contest.

Trial counsel thereafter concentrated on attempting to obtain a court order for Warren's psychiatric treatment, in view of Warren's mental disability due to post-traumatic stress disorder. Trial counsel had represented the defendant for over eighteen months and had never questioned his present competency. As noted above in the discussion of whether the trial court should have ordered a competency hearing *sua sponte*, the testimony of Warren's treating psychiatrist, the failure of any of the other four medical experts to question Warren's competency, the express opinion of one expert that Warren was competent, and Warren's evident ability to communicate with counsel gave little reason to doubt Warren's

competency.[3] In view of such evidence, it was not ineffective assistance of counsel to forgo an insanity defense and advise Warren to enter the plea agreement and plead no contest without first requesting a competency hearing. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

Warren's sentencing hearing was held thirty-five days after his change-of-plea hearing. Although he was confined in jail during that time and had attempted

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[3] The dissent emphasizes that trial counsel had two pieces of information potentially relevant to competency that the trail court lacked. First, according to the memorandum of points and authorities in support of Warren's motion for state post-conviction relief, counsel knew that the majority of his discussions regarding the plea agreement had been with Warren's wife. Second, according to affidavits from Warren's wife, counsel learned after the change-of-plea hearing that, at the close of this hearing, Warren had commented, "What was that all about?"

Even assuming the truth of such information—which is not at all clear from the record—the dissent exaggerates its import. Warren was present for all of counsel's discussions regarding the plea agreement, and the possibility that his wife was a more active participant in these discussions than he does not imply he could not understand the discussions or effectively communicate with counsel. Additionally, Warren's purported statement, "What was that all about?" is too ambiguous to demonstrate that he did not understand the change-of-plea proceedings. In colloquial English, such a statement could have been a dismissive, pejorative reference to the proceedings as easily as an expression of confusion. Thus, in light of the record as a whole, any evidence of incompetency available to trial counsel and unavailable to the trial court was insufficient to compel good faith doubt as to Warren's competency.

suicide, there was no evidence of any change in his overall mental condition to warrant calling for a competency hearing.

Nor was there any showing of ineffective assistance of post-conviction appellate counsel sufficient to warrant habeas relief. In the first state post-conviction proceeding, counsel did not assert any claim of ineffectiveness of trial counsel. Those claims, however, were asserted, argued, and resolved in the second state post-conviction proceeding. Thus, all claims of ineffective assistance of trial and post-conviction appellate counsel were addressed and considered in the post-conviction state court proceedings. Moreover, because Warren's trial counsel was not ineffective, there was no prejudice by any failure of post-conviction appellate counsel to have raised the omitted claims of ineffectiveness of trial counsel in the first state post-conviction proceeding.[4]

AFFIRMED.

[4] We note that a showing of prejudice is necessary in Warren's case because *Cuyler v. Sullivan*, 446 U.S. 335 (1980), does not apply on collateral review except to cases in which counsel concurrently represented multiple clients. *See Earp v. Ornoski*, No. 03-99005, 2005 WL 3440810, at *18–20 (9th Cir. Dec. 16, 2005).